FILED
SCRANTON
3:12-cv-763 APR 24 2012
PER
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Shawn Martz

Vs.

Blair County District Attorney;

Blair County Probation Office;

Mr. David Varano, Superintendent,

SCI COAL Township

March 25, 2012

RE: State Case #291/2008, et al., et seq.

Burglary 18 Pa. §3502 §AA

Honorable Judge Elizabeth A. Doyle

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. §2254

Now Comes Petitioner Shawn Martz, Pro Se, and Prays this Honorable Court's Forbearance in reviewing his Request for Habeas Relief, in consideration of the following: **Statement of the case; Argument:**

1. On 6/26/08, Petitioner was sentenced to 5 years probation at a previous probation, Blair County #494/2005, revoked and reinstated, as part of plea bargain at #291/2008.

2. Later that same day 6/26/08, he was sentenced at the above captioned #291/2008 et seq., pursuant to a specific negotiated plea bargain, to wit 5 to 10 years with a deferred report date until 9/8/08; the interim time 6/26/08 to 9/8/08 he would be released and permitted to be serving his sentence via electronic monitoring device, "in custody"(see **Com. v. Chiappini** 782 A.2d 490(PA.2001)). His electronic monitoring was to be supervised by the Blair Cty. Probation Dept.

3. On 7/17/08, Petitioner was arrested and re incarcerated by Blair Cty. Probation at #291/2008 for violating his electronic monitoring, after he was hospitalized. On 8/12/08 he was transported to state prison to begin serving #291/08.

4. Petitioner's argument is that the Commonwealth violated his right to due process and breached his plea bargain when he was arbitrarily arrested cutting short the electronic monitored portion of his sentence at #291/08, on 7/17/08, 8/12/08; without notice or hearing, ostensibly because he was hospitalized due to an allergic reaction to a legal prescription medication.

The Commonwealth's argument has been that there was no due process violation for lack of hearing as he has not yet had his 'Gagnon' hearing at an unrelated probation case at #494/2005. And that his plea was not breached at #291/08 because his hospitalization was due to an overdose on illegal heroin. And that the District Attorney had nothing to do with his commitment to state prison on 8/12/08, and the probation department had no authority to commit him on 8/12/08(see 61 P.S. §331.17), therefore there was no due process violation for lack of hearing, and no breach of the plea.

Yet, he was certainly comitted to state prison on 8/12/08, before his plea bargained for date of 9/8/08, see **APPX.A.**(at comment), by both the District Attorney and the probation department, see **AAPX.B.**. Petitioner argues that the reason he was not afforded his due process rights 8/12/08 to determine the cause of his hospitalization is because the supposition that he had overdosed on heroin was founded on speculative, melodramatic rumor. He was represented at plea and sentencing by Attorney Joel C. Steegle, Esq.

5. On 9/8/05 he filed Pro Se PCRA(42Pa.C.S.§9541,et seq.), Attorney Timothy Burns, Esq., appointed counsel. An Evidentiary was held and PCRA was denied 8/12/09. An appeal to Superior Court was denied at #1758 WDA 2009 on 9/7/11, and Petition for Allowance of Appeal to the PA. Supreme Court was denied on 2/15/12. Grounds 1, 2, and 3(below) were raised on both appeals. He now brings this timely exhausted Petition for Writ Of Habeas Corpus to this Honorable Court under the auspices of 28 U.S.C. §2254, et seq.

6. He has previously filed a §1983 in the U.S. District Court for the Western District of Pennsylvania, but thereafter withdrew that action at #9-CV-314. He has filed no other actions at #291/08, state or federal, ergo he has no other petitions pending in any court.

7. He has filed a state habeas/PCRA at #494/2005, only to be confirmed that he was not ever pursued delinquency, or recommitted, at #494/2005 for violation of probation at that number there. However, he abandoned that action when he found he would suffer adverse consequences if he continued pursuit, and the court also ruled that the PCRA was not the proper forum notwithstanding. See **APPX.C.**(2 pages) and **APPX.D.** Attorney Matthew P.Geig, Esq., apppointed counsel at this #494/2005.

8. There is no entry relevant to his recommitment at the docket for #291/08, 7/17/08, 8/12/08. At #494/05, the docket reveals ultimate decision not to pursue delinquency on 4/20/09. See **APPX.E.** and **APPX.F.**

Argument

9. At #1758 WDA 2009, Attorney Burns argued citing **Com. v. Hickman** 799 A.2d 136(PA.SUPER.2002) and **Hill v. Lockhart** 474 US 52(1985), to withdraw his plea under the mantle of ineffective counsel, manifest injustice, and failure to determine the cause of Petitioner's hospitalization by depriving him notice and hearing.

Petitioner believed that Attorney Burns failed to focus on the post-plea actions of the Commonwealth, i.e., arrest and reincarceration without due process of law under the 14th Amendment, on 7/17/08, 8/12/08. Thereafter and therein the Commonwealth breached his plea bargained for electronic monitored portion of his sentence promised him in exchange for his plea. He argues he had a vested liberty interest in remaining on electronic monitoring free from state prison until 9/8/08. He filed a 'Pro Se petition for remand/ineffectiveness of appellant counsel' following the letter and spirit of state law remedy at **Com. v. Battle** and **Com. v. Jette**. See **APPX.G.**(7 pages). The Superior Court remanded accordingly. **APPX.H.**(3 pages).

10. Attorney Burns responded promptly stating that he had searched the data base and Petitioner was not a licensed attorney in Pennsylvania, or any other state(see **APPX.H.** at "Mr. Shawn Martz, **Esq.**); and that he (Atty.Burns) knew of no procedural rule that could compel him to comply with a remand order of this nature and demanded a hearing before the Superior Court en banc; and that notwithstanding Petitioner's Pro Se **APPX.G.** had no merit. The Superior Court did not respond to Atty. Burns.

11. Attorney Burns was correct in part, as over one year later during the pendency of #1758 WDA 2009, the Supreme Court of Pennsylvania overruled **Com. v. Battle**(APPX.G. pg.3), in **Com. v. Jette** 23 A.3d 1032(PA.2011). But see Mr. Justice Baer's reasoned opinion stating that the case the majority relied in overturning, **Com. v. Ellis**(Rule 3304), was a direct appeal and should not apply on PCRA(PCRA as here), at **1048-49.**

12. Petitioner was also correct in part as he argues that the Superior **Court** erred at #1758WDA2009 in ruling that **a)** Attorney Burns' presentation that Petitioner was deprived a hearing to determine the cause of his hospitalization was insignificant, as **b)**, the Court instead assimilated as **fact** that Petitioner had overdosed on heroin without any factfinding to the extent that his heroin overdose rose to the level as to violate his probation at the unrelated(494/05) case and **c)**, the **Court** found as **fact** that he was violated on his probation at the unrelated(494/05) probation and **d)**, the **Court** found him guilty of violating the electronic monitoring portion of his sentence at #291/08 and **e)**, the **Court** found that in violating his electronic monitoring he violated the terms of his plea agreement and **f)**, the **Court** burdened him for not providing rebuttal evidence that he did not overdose on heroin. Please see #1758WDA2009 appeal denied, Pages 9,10,11, footnote pg.10, **APPX.I.**(3 pages).

The **Court** erred at #1758WDA2009 as **a)**, Petitioner was not provided a hearing on 7/17/08, 8/12/08 and **b)**, he was not accused of(provided notice) that he overdosed on heroin and **c)**, he was not ever violated on his probation at #494/05 on 7/17/08, 8/12/08, or since, and **d)**, he was not ever found guilty of violating his electronic monitoring at #291/08 and **e)**, he was not ever afforded a hearing to determine whether he breached his plea agreement and **f)**, there was not ever any evidence presented via notice, testimony, hearing, or otherwise that he overdosed on heroin - therefore he could not have possibly been expected to rebut evidence that did not exist.

The Commonwealth simply found idle rumor as true, or simply speculated a heroin overdose, as there has not ever been any evidence procurred, adduced, or evinced under the Due Process Clause or otherwise, that this Petitioner did ANYTHING illegal while he was serving his electronic monitoring portion of his sentence at #291/08.

13. GROUND ONE:(Exhaustion For) INEFFECTIVENESS OF APPELLANT COUNSEL. DUE PROCESS VIOLATION. Petitioner argues that this Honorable Court may consider **APPX.G.** and the ineffectiveness argument as delineated therein; and thereby the Due Process violation argument under the 14th Amendment's **Morrissey v. Brewer** 92 S Ct. 2593(US 1972), under the 6th Amendment's **Strickland v. Washington** 466 US 668(1984);

As Attorney Burns was only correct to the extent that the Supreme Court of PA. did overturn **Battle** in **Jette**. But the ex post facto clause of the United States Constitution is implicated here as Petitioner followed good law in **Battle** at the time he filed **APPX.G.** And "a state court's blatant misapplication of its own laws will not have a preclusive effect on the federal court's jurisdiction to review claim[**APPX.G.**]." See **Evans v. Beard** 639 F.Supp. 2d 497,510(E.D.PA.2009). And state law calls for ineffectiveness when counsel refuses to include all pro se claimsin appeal **Com. v. Albrecht** 720 A.2d 693. And no procedural default occurs when counsel refuses to include all claims in appellant's brief. See **Clemmons v. Delo** 124 F.3d 944,953-55(8th Circuit 1997); Compare also excusing procedural default **Edwards v. Carpenter** 120 S Ct. 1587(US2000).

And, the PCRA was his ONLY chance to have his claims of Due Process and Plea Breach claims reviewed, as his first appeal of right, unlike **Pa. V. Finley** 481 US 551, he should be protected by the 6th and 14th Amendments regarding his PCRA first appeal of right. However, in Pennsylvania this simply isn't so. See **Com. v. Bennett** 930 A.2d 1264, at 1273 and 1274. This is especially striking as **Com. v. Grant** 813 A.2d 726(PA.2003) commands all **Strickland** claims of ineffectiveness must wait for PCRA.

This is all contrary to clearly established federal law. See **Coleman v. Thompson** 501 U.S. 722, at 755-56(US1991) citing **Douglas v. California** 372 US 353(1963) and **Evitts v. Lucey** 469 US 387(1985). See also **Coleman** at 733-74; "[I]f a state desires to remove from the process of direct appellant review a claim or category of claims[here, '**Strickland**' ineffectiveness of trial counsel claims, **Com. v. Grant**; and **Com. v. Wright** 961 A.2d 119, 148 n.22(PA.2008)], the Fourteenth Amendment binds the state to ensure that the defendant has effective assistance of counsel for the entirety of the procedure where the removed claims may be raised." Here, **Bennett** requires no 6th or 14th Amendment protections on PCRA under **Grant**.

14. GROUND TWO: THE COMMONWEALTH BREACHED HIS PLEA BARGAIN. Petitioner argues, as described above, that his plea was violated post sentence when he was committed to state prison 8/12/08, before his negotiated agreed upon date of 9/8/08. See **Com. v. Zuber** 353 A.2d 441; **People v. Santobello** 331 N.Y. S.2d 776.

15. GROUND THREE. THE COMMONWEALTH VIOLATED HIS RIGHT TO DUE PROCESS. Petitioner had a liberty interest flowing from the 14th Amendment of the United States Constitution in remaining on his electronic monitoring until 9/8/08, and his arrest therefrom on(7/17/08) 8/12/08, without written notice or hearing nor opportunity to hear evidence and cross-examine adverse witnesses violated his right to due process in contravention of **Morrissey v. Brewer**, supra.

WHEREFORE, Petitioner Prays this Honorable Court's Forbearance in Granting him relief in that he be permitted to withdraw his plea, or any other form of relief this Discerning Court may deem just.

I hereby aver and attest that all the foregoing is true and correct, under penalty of perjury. Most Respectfully, [signature] SHAWN MARTZ

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF PENNSYLVANIA

Shawn Martz XXXXXXXXXX	:	
Petitioner	:	
V.	: Civil Action #	Section 2254
Blair County D.A., et al.	:	Habeas Corpus
	:	
Defendant(s)	:	

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT TRUE AND CORRECT COPIES OF THE FOREGOING DOCUMENT(S) WERE SERVED UPON Pennsylvania Atty. General THIS DAY BY CAUSING SAME TO BE DEPOSITED IN THE UNITED STATES POSTAL SERVICE, FIRST CLASS AND PRE-PAID, ADDRESSES AS FOLLOWS:

Office of the Pennsylvania Attorney General

15th Floor Strawberry Square

Harrisburg, Pa. 17120

SUBMITTED,

SHAWN MARTZ

DATE: 4-19-12.

06/26/2008	Blair	CP1464 CT1/2008	CC	2			4		
Plea:	Plead Guilty	**OTN:** K7648104	**Judge:** DOYLE, ELIZABETH A.						
Offense:	**CC3502A - BURGLARY**								
06/26/2008	Blair	CP1466 CT1/2008	CC	2			4		
Plea:	Plead Guilty	**OTN:** K7648130	**Judge:** DOYLE, ELIZABETH A.						
Offense:	**CC3502A - BURGLARY**								
06/26/2008	Blair	CP1468 CT1/2008	CC	2			4		
Plea:	Plead Guilty	**OTN:** K7648163	**Judge:** DOYLE, ELIZABETH A.						
Offense:	**CC3502A - BURGLARY**								
06/26/2008	Blair	CP1469 CT1/2008	CC	2			4		
Plea:	Plead Guilty	**OTN:** K7648141	**Judge:** DOYLE, ELIZABETH A.						
Offense:	**CC3502A - BURGLARY**								
06/26/2008	Blair	CP1470 CT1/2008	CC	2			4		
Plea:	Plead Guilty	**OTN:** K7648174	**Judge:** DOYLE, ELIZABETH A.						
Offense:	**CC3502A - BURGLARY**								

Reception Date	08/12/2008	**Reentered from DOC #**	
Controlling Minimum Date	07/17/2013	**New Maximum - PV**	
Controlling Maximum Date	07/17/2018	**True Minimum Expiry Date**	
RRRI Minimum Expiry Date			

Summary or Remarks on Sentence

Remarks

Version 2 created to change CP1439 Ct2 to CP1439 Ct1.
Effective date of sentence is 7/17/2008. Inmate was supposed to report on 9/8/2008; however he was picked up on 7/17/2008 for violating his electronic monitoring.

Computation 2
CP1439 CT1/2008
CP1470 CT1/2008
CP1469 CT1/2008
CP1468 CT1/2008
CP1466 CT1/2008
CP1464 CT1/2008
CP1461 CT1/2008
CP1455 CT1/2008
CP1454 CT1/2008
CP1453 CT1/2008
CP1452 CT2/2008
CP1451 CT1/2008
CP1450 CT2/2008
CP1449 CT1/2008
CP1448 CT1/2008
CP1446 CT1/2008
CP1445 CT1/2008
CP1444 CT1/2008

B.

Grabill & Grabill, P.L.L.C.

Brian H. Grabill
Karen L. Grabill
Joel C. Seelye

Attorney at Law

Email: Brian@GrabillandGrabill.com
Email: Karen@GrabillandGrabill.com
Email: Joel@GrabillandGrabill.com

July 29, 2008

Shawn Martz
c/o Blair County Prison
419 Market Square Alley
Hollidaysburg, PA 16648

RE: COMMONWEALTH OF PA. V. SHAWN MARTZ

Dear Mr. Martz:

I have become aware of your recent incarceration stemming from an alleged drug overdose in your home.

I am sure you are aware of the hesitation of the Court to defer your report date until September. If you will recall, we had to spend many hours over a period of two days negotiating and pleading with the Judge to agree to the deferral. Furthermore, the Parole and Probation Office was extremely reluctant to lift your detainer and resentence you to probation. However, we were able to get the deal through and obtain your release.

On that date, you entered pleas of guilty and was sentenced consistent with your plea agreement. Therefore, your cases are complete and you do not have any further court dates to attend. The only possible court date remaining would be a change in your report date from September until now. You will then be transported to a State Correctional Institution immediately to begin serving your sentence.

I have spoke with the District Attorney and Parole and Probation office regarding this matter and due to the presence of drugs in your system, in violation of the terms of your release, they are unwilling to again release you from incarceration. However, even if they were willing to agree to such release, no Judge in Blair County would order your release give the facts and circumstances surrounding your situation.

C.

GIEG AND GIEG
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ALTOONA, PENNSYLVANIA 16602
(814) 946-1606
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FREDERICK B. GIEG, JR.

FRED B. GIEG
(1915-2000)

ASSOCIATES:
MATTHEW P. GIEG
CHRISTOPHER R. JANCULA

September 1, 2011

Shawn Martz
SCI Coal Township
Department of Corrections
Inmate No. HR 8462
1 Kelley Drive
Coal Township, Pa 17866-1020

In Re: Commonwealth vs. Shawn J. Martz
No. CR 494-2005

Dear Mr. Martz:

Please be advised that on August 30, 2011 Judge Doyle held a status conference with counsel only. I have had the opportunity to closely review your file and specifically review the above-captioned case as it applies to CR 291-2008. Based on my careful review of CR 494-2005 it seems glaringly obvious that the Blair County Adult Parole and Probation Office committed an error which resulted in procedural irregularities. It is my position that the aforementioned procedural missteps by the Adult Parole and Probation Office clearly resulted in a violation of your procedural due process rights. To be specific, the Adult Parole and Probation Office lodged a detainer on you relative to case no. 494-2005 and after doing so never provided you notice as required by law as to the reason for the detainer as well as other procedural protections you are entitled to as a matter of law. It is my understanding that this resulted in your furlough being cut short relative to CR 291-2008 by approximately one (1) month. Although there clearly exists a procedural irregularity and a violation of due process, the precise remedy a Court could provide is problematic. More specifically, a restoration of your rights would result in a Gagnon I hearing being conducted in order to determine whether a violation occurred. In addition, as you are aware a Gagnon II would have to be held as well assuming the Gagnon I resulted in the case moving forward. The potential problem lies in the authority of the Court to actually sentence you to more time than you otherwise are serving under the status quo. I must advise you that the relief you are seeking, namely a Gagon I hearing, could potentially result in a further penalty which in effect would be no relief at all. In addition, as you are aware, the pending PCRA relative to

494 -2005 is directly intertwined with CR 291-2008 for which a PCRA petition is pending on appeal at No. 1758 WDA 2009. The Pennsylvania Appellate Courts have held as a general matter that the Court cannot property decide a subsequent or second PCRA claim when there is a pending PCRA which has not been fully disposed of by the highest Appellate Court in the Commonwealth. Considering all of the foregoing, it is my intention to research this matter more thoroughly so that I can better ascertain whether or not the PCRA claim relative to CR 494-2005 is cognizable and whether or not the Court of Common Pleas of Blair County can property entertain said claim. It is the Court's intention following the status conference to conduct the hearing on October 6, 2011 at which time I will have fully researched the issue and can present to the Court why, as a matter of law, the case should or should not be heard at this stage. Please know that it is my intention to represent to the Court that this claim should move forward as I wish to fully represent your interest in all respects. Therefore, I will research and analyze this issue with an eye towards finding ways to properly distinguish this case from the case pending on appeal in the Superior Court of Pennsylvania.

Please write to me if you would like to comment on the contents of this letter and/or your understanding of the extent to which the current claim docketed at CR 494-2005 is cognizable under the Post Conviction Relief Act given the pending litigation.

Sincerely yours,
GIEG LAW OFFICES

By: Matthew P. Gieg

MPG/nm

D.

IN THE COURT OF COMMON PLEAS OF BLAIR COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
-vs-	:	CR 494-2005
	:	
SHAWN J. MARTZ	:	

THE HON. ELIZABETH A. DOYLE	:	PRESIDING JUDGE
RICHARD A. CONSIGLIO, ESQUIRE	:	DISTRICT ATTORNEY
MATTHEW GIEG, ESQUIRE	:	COUNSEL FOR DEFENDANT

ORDER

AND NOW, this 2nd day of February, 2012, this matter having come before the Court at CR 494-2005 and the Court having heard from defense counsel, as well as the Defendant himself in regards to that case that the Defendant does not want to pursue the specific remedy of having a Gagnon I and potentially a subsequent Gagnon II proceeding. Further, the matter is not in the current proper posture for Post-Conviction Relief, so, to the extent that PCRA relief is sought in this matter, that relief is denied and dismissed. It is the Court's view that the proceedings in regards to CR 494-2005 are thus terminated as a result of the Defendant's declining the only remedy the Court could order in this matter in the posture of the case this date. This order is entered without prejudice to the Defendant filing any other proper and timely motion.

BY THE COURT

_______________________________ J.

lah

(E.)

COURT OF COMMON PLEAS OF BLAIR COUNTY

DOCKET

Docket Number: CP-07-CR-0000291-2008

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Shawn Joseph Martz

ENTRIES

Sequence Number	CP Filed Date	Document Date	Filed By
Service To		Service By	
Issue Date	Service Type	Status Date	Service Status
06/09/2008			
Public Defender,		Blair County Clerk of Courts	
06/09/2008			
1	06/09/2008		
Bail Set - Martz, Shawn Joseph			Grubb Kopriva, Jolene
2	06/26/2008		
Guilty Plea			Doyle, Elizabeth
1	06/30/2008	06/26/2008	
Order - Sentence/Penalty Imposed			Doyle, Elizabeth
2	06/30/2008	06/25/2008	
Written Guilty Plea Colloquy			Martz, Shawn Joseph
1	08/05/2008	07/30/2008	
Criminal Motion For Court-Appointed Counsel			Public Defender,
2	08/05/2008	07/30/2008	
Order Granting Motion for Appointment of Counsel			Doyle, Elizabeth
1	08/21/2008	08/14/2008	
Corrected Order Filed			Doyle, Elizabeth
1	09/08/2008		
Petition for Post Conviction Collateral Relief Copy Sent to DA on 9-9-08			Martz, Shawn Joseph

Recent entries made in the court filing offices may not be immediately reflected on these docket sheets. Neither the courts of the Unified Judicial System of the Commonwealth of Pennsylvania nor the Administrative Office of Pennsylvania Courts assume any liability for inaccurate or delayed data, errors or omissions on these reports. Docket Sheet information should not be used in place of a criminal history background check which can only be provided by the Pennsylvania State Police. Moreover an employer who does not comply with the provisions of the Criminal History Record Information Act may be subject to civil liability as set forth in 18 Pa.C.S. Section 9183.

(F)

COURT OF COMMON PLEAS OF BLAIR COUNTY

DOCKET

Docket Number: CP-07-CR-0000494-2005

CRIMINAL DOCKET

Court Case

Commonwealth of Pennsylvania
v.
Shawn Joseph Martz

ENTRIES

Sequence Number	CP Filed Date	Document Date	
Service To		Service By	Filed By
Issue Date	Service Type	Status Date	Service Status
			Blair County Court Administration
1	06/30/2008		
Pursue Delinquency			
			Martz, Shawn Joseph
1	07/02/2008	06/26/2008	
Order revoking probation and is re-sentenced			
Public, Defender		Blair County Judge's Chambers	Doyle, Elizabeth
07/01/2008			
1	07/21/2008		
Do Not Pursue Delinquency			
			Martz, Shawn Joseph
1	08/12/2008		
Pursue Delinquency			
			Martz, Shawn Joseph
1	04/20/2009		
Do Not Pursue Delinquency			
			Martz, Shawn Joseph
1	06/02/2010		
Petition for Post Conviction Collateral Relief			
			Martz, Shawn Joseph

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G.

IN THE SUPERIOR COURT OF PENNYSLVANIA

WESTERN DISTRICT

Commonwealth

Vs.

Shawn Joseph Martz

No: 1758 WDA 2009

PCRA

Blair Cty. #291/2008

6-4-10

PRO SE PETITION FOR REMAND

ALLEGATION OF INEFFECTIVE ASSISTANCE PCRA COUNSEL

APPOINTMENT OF NEW COUNSEL

Now Comes Petitioner Shawn Joseph Martz, Pro Se, and brings allegation of ineffective assistance, requests remand for appointment of new counsel, and offers the following in support thereof:

A.) Petitioner filed for Post-Conviction Relief(PCRA), at the above captioned on 9/8/08. In his petition he brought claim that the Commonwealth had not adhered to the terms of his plea agreement, violating the plea bargain, and in doing so violated his Constitutional right to procedural due process.

This claim is based on the fact that his plea agreement was specific in that he'd be sentenced 6/26/08 to a period of electronic monitoring until 9/8/08, at which time he would then begin an incarcerated portion of his sentence, i.e., 5 to 10 years. However, on 7/17,8/12/08 without written notice or hearing provided, he was detained and transported to state prison to begin serving his incarceration.

B.) The trial court assigned PCRA counsel who argued in informing the court and petitioner that the 9/8/08 pro se petition spoke for itself in terms of arguable merit, and a PCRA hearing was warranted, thereafter held 8/12/09. See Ex. #1, #2.

C.) That at the 8/12/09 evidentiary hearing the Commonwealth presented a seemingly irreconcilable contradiction as evidence that his plea bargain had not been violated. Attorney Consiglio of the District Attorney's Office offerring that they had nothing to do whatsoever with the 7/17/08, 8/12/08 detainer and transport action, that this action was taken at an unrelated case at #494/2005; Mr. Shea of the Blair Cty. Probation Department at #494/2005 offerring the action taken at #494/2005 had nothing to do with the 8/12/08 transport to state prison at #291/2008, as the probation department hadn't the authority to do so, TO WIT:

ATTORNEY CONSIGLIO: The Commonwealth being the District Attorney's Office, the police, uh --- in connection with this crime and the State Parole have done nothing to interfere with that late --- with that deferred reporting time." (N/T, #291/2008, 8/12/09, pg.1); "THE COURT: And the detainer [7/17/08] was placed on which criminal numbers? MR. SHEA: Uh --- it would have been on um --- 494 of 05. THE COURT: Then what happened? MR.SHEA: Um --- nothing that I'm aware of. Um --- I made you aware of that he was in jail because of the other things going on uh --- with the state sentence and um --- before we ever had time to request and have a gag two hearing he was away and I --- nothing else happened at that point." (N/T, 8/12/09, pg.5).

"ATTORNEY CONSIGLIO: Okay. And further um --- just to be perfectly clear I know you've already given the number upon which you have uh --- detained --- you had detained Mr. Martz but he was not detained of any of the 2008 charges that the judge just cited? MR.SHEA: No, we had no authority ---." (N/T, pg.8); "ATTORNEY CONSIGLIO: "...we have done nothing if Mr. Martz ended up in jail for some reason it had nothing to do with his agreement with us." (N/T, pg.10).

The court then dismissed the petition, by Order that day, 8/12/09.

D.) Petitioner requested an appeal to argue Atty. Consiglio's position that the record reflects no action was taken 7/17/08, 8/12/08, at #291/2008 - can indeed be reconciled, as the record reflects directly contrary to Atty. Consiglio's position, i.e., that the action taken 7/17/08, 8/12/08 was singularly attributed to #291/2008. See Exhibit #3.

E.) Counsel has brought this instant appeal, but in the alternative **only** argues that Petitioner did not enter a knowing and competent plea, under the mantle of ineffectiveness of plea counsel. PCRA counsel may not justify his failure to argue certain issues by claiming those issues are without merit, after arguing broadly that an evidentiary hearing was warranted without specifying what issue merited a hearing. See **Com. v. Warren**, 979 A.2d 920 (Pa.Super.2009).

F.) In **Com. v. Jette**, 947 A.2d 202(Pa.Super.2008), the court held that when defendant raises pro se allegations of ineffective assistance of counsel, counsel must review record thoroughly to determine merits of claims defendant wishes to raise. "...an appellant who is represented by counsel files a pro se petition, brief, or motion, this Court forwards that document to his counsel. If the brief alleges ineffectiveness of appellant counsel [as here], counsel is required to petition this Court for remand. In the petition for remand, counselmust cite apppellant's allegations of ineffectiveness and provide this Court with an evaluation of those claims. (Citations omitted)", **Jette** at 204, citing **Com.v Battle**, 879 A.2d 266, (Pa.Super.2005).

G.) Petitioner is in agreement with, and wishes to further claim that counsel has brought in this instant appeal. However, he feels that counsel is remiss in not pursuing the other side of both his due process and violation of plea bargain claim(s).

Additional Claims

1.) Counsel argues that due process was violated as when no hearing was was conducted to determine the cause of petitioner's hospitalization. Petitioner **ALSO** wishes to argue claim that due process was violated per se when no hearing was conducted period, no written notice given - to determine the cause of his incarceration by revocation of the electronic monitoring portion of his state sentence at #291/2008, on 7/17/08, 8/12/08.

2.) Counsel argues his plea was not knowing and competently entered, ineffectiveness of plea counsel. Petitioner **ALSO** wishes to argue that his plea was effectually violated by the Commonwealth well after the plea was **validly** entered, by revocation of the electronic monitoring portion promised in exchange for his plea of guilty; and subsequent transport to state prison before his plea bargained for date of 9/8/08.

Petitioner wishes to argue that Mr. Shea is correct, that the county probation and parole department had absolutely no authority to revoke the electronic monitoring portion of his state sentence at #291/08, as a sentence of two years or more authority to revoke is vested solely and exclusively in the Pennsylvania Board of Probation and Parole, see 61 P.S. §331.17, Section 17, which reads in relevant part;

that the Board shall have exclusive power to parole and reparole sentences "2 years or more". *** "That the sentence of two years herein shall mean the continuous term of sentence to which a person is subject, whether the same be by one or more sentences." 61 P.S. §331.17. See also Com. v. Ford-Bey, 590 A.2d 782 (Pa. Super. 1991).

Moreover, the record clearly reflects the 7/17/08, 8/12/08 action was taken at #291/2008. Again see exhibit #3.

Because if the action had been taken at #494/2005, precipitating, effectuating service of the incarcerated portion of sentence at #291/2008 by the county probation department - The instant commitment order is a nullity. See 1981-84 Pa. Op. Atty. Gen.25, Official Opinion No.83-1 "Board of Probation and Parole - Practice engaged in by judges to authorize the parole of prisoners whose maximum sentences are two years or more."

That said, Petitioner wishes to argue on this instant appeal that Attorney Consiglio is disingenuous in presenting that the Commonwealth had nothing to do with the 7/17/08, 8/12/08 action at #291/2008. See Exhibit #3.

As such, he wishes counsel to brief claim that plea counsel was not per se ineffective, as at the time the plea was entered into it was valid. It was only when the Commonwealth, subsequently and capricously, broke the promise it made to this Petitioner in exchange for his plea of guilty. This breach of promise did not occur until 7/17/08, 8/12/08. The prosecutor has an affirmative duty to honor any and all promises made in exchange for a defendant's plea. **See Com. v. Zuber**, 353 A.2d 441 (Pa.1976). "in Pennsylvania it is well settled that 'where a plea bargain has been entered into and is violated by the Commonwealth, the defendant is entitled, at the least, to the benefit of the bargain'". **Zuber** at 444.;

And in so violating his plea bargain, the Commonwealth failed to provide; (1) written notice of why he was detained; (2) disclosure of evidence of wrong doing as to why he was detained; (3) an opportunity to be heard in person by the fact finder to present evidence; (4) opportunity to confront any adverse witness; (5) a neutral and detached hearing body; (6) a written statement by the fact finder as to the evidence relied upon and the reason for revoking his plea bargain on 7/17/08, 8/12/08. This failure is an absolute blanket due process violation. But not in the manner of depriving gagnon hearing at #494/05, but in the manner of depriving due process as to the de facto resentencing at #291/08, on 7/17;8/12/08.

See **Lee v. Board of Probation and Parole**, 855 A.2d 634 (Pa. Cmwlth. 2005); **Morrissey v. Brewer**, 92 S.Ct. 2593 (1972); U.S.C.A., Const. Amend.14.

WHEREFORE, Petitioner requests current counsel brief the additional claims just cited, provide an analysis as to why these claims lack merit, or petition this court for remand for appointment of counsel who may then brief these claims for appeal at this instant appeal.

Most Respectfully,

____

SHAWN MARTZ

PROOF OF SERVICE

I hereby certify that I am this day serving the foregoing document(s) (Pro Se Petition For Remand, Ineffective Counsel) upon the persons and in the manner indicated below which service satisfies the requirements of Pa.R.A.P. 121:

Name: Deputy Prothonotary
Address: Eleanor R. Valecko
310 Grant St Suite 600
Pittsburgh, PA 15219
Phone:
(Counsel for:)

Type of Service: First Class Mail

3 copies & original

Name: District Attorney Office
Address: Richard Consiglio
Blair County Courthouse
423 Allegheny St Hollidaysburg
Phone: PA 16648
(Counsel for:)

Type of Service: First Class Mail

Signed: Shawn Martz
Name: Shawn Martz
Address: SCI Coal Township
1 Kelley Drive Coal Township,
Phone: PA 17866

Date: 6-4-10

H.

The Superior Court of Pennsylvania
Office of the Prothonotary

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July 9, 2010

Mr. Shawn Joseph Martz, Esquire
HR-8462
SCI Coal Township
1 Kelley Drive
Coal Township, PA 17866-1020

In Re: COMMONWEALTH OF PENNSYLVANIA -v- SHAWN J. MARTZ
No. 1758 W.D.A. 2009

Mr. Joseph Martz:

The Court has entered an Order on the Petition For Remand, filed by appellant in reference to the above-captioned matter; a copy of same is enclosed.

Very truly yours,

Eleanor R. Valecko
Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/tdt

Cc: Timothy S. Burns, Esquire
Richard A. Consiglio, Esquire
Honorable Elizabeth A. Doyle

COMMONWEALTH OF PENNSYLVANIA, Appellee vs. SHAWN JOSEPH MARTZ, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1758 WDA 2009

Appeal from the PCRA Order August 12, 2009
In the Court of Common Pleas of Blair County
Criminal, Nos. CR-0000034-08
CP-07-CR-0000291-2008
CP-07-CR-0000297—299-2008
CP-07-CR-0000709-2008
CP-07-CR-0000711-2008
CP-07-CR-0001439—1441-2008
CP-07-CR-0001443—1455-2008
CP-07-CR-0001461-2008
CP-07-CR-0001464—1466-2008
CP-07-CR-0001468—1470-2008

O R D E R

AND NOW, this 9th day of July 2010, we deny Appellant's *pro se* application for remand and appointment of new counsel, filed on June 9, 2010. The Prothonotary of this Court shall immediately forward a copy of this *pro se* application to Appellant's counsel. Counsel shall then have fourteen (14) days from the filing date of this order, to submit a counseled petition to this Court. In that petition, counsel must recite and address Appellant's allegations of ineffectiveness of counsel contained in his application, and provide this Court with an analysis of Appellant's claims. ***Commonwealth v. Battle***, 879 A.2d 266 (Pa.Super. 2005). We will then determine whether remand for appointment of new counsel is required, based on our review of counsel's petition and the record. ***Id.*** The petition must show "irreconcilable differences" exist, as appointed counsel may be rejected only for good cause shown. ***Id.***

PER CURIAM

BY: ______________________

The benefit of the bargain principle is reciprocal in nature and likewise obligates the defendant to the terms of a plea agreement. ***Commonwealth v. Coles***, 530 A.2d 453 (Pa.Super. 1987), *appeal denied*, 522 Pa. 572, 559 A.2d 34 (1989). To permit a defendant to reap the benefits of his bargain after he breaches the plea agreement "would make a sham of the negotiated plea process and would give the defendant a second bite at his sentence, which we have frequently deplored in the context of withdrawal of a guilty plea." ***Id.*** at 456. ***See also Commonwealth v. Wallace***, 582 Pa. 234, 242 n.6, 870 A.2d 838, 843 n.6 (2005) (reiterating that defendant must fulfill his own obligations under plea agreement to retain benefits of his plea bargain).

In the instant case, Appellant entered a guilty plea to numerous burglary charges and related offenses; he was sentenced and then furloughed, in accordance with the terms of the plea agreement. As part of his sentence, the court noted Appellant was also subject to all the supervisory terms imposed at a ***Gagnon II***[2] proceeding in another case held earlier that day. (***See*** Sentencing Order, dated June 26, 2008, at 17.) Appellant was hospitalized about two weeks into his furlough as a result of a drug overdose. Upon his release from the hospital, BCP detained Appellant citing the overdose as a violation of his prior probation regarding a previous sentence in a 2005 case. At the PCRA hearing, the district attorney said his

[2] ***Gagnon v. Scarpelli,*** 411 U.S. 778, 93 S.Ct. 1756, 1761, 36 L.Ed.2d 656 (1973).

office was not involved in BCP's decision to detain Appellant; did not learn of Appellant's detention until after the fact; and did not revoke his furlough in the present case. The Commonwealth took the position that it did not breach its bargain with Appellant in this case, when BCP detained Appellant during his furlough because Appellant's own actions constituted a probation violation in an unrelated matter. Although there was some dispute over the reason for Appellant's hospitalization and the subsequent BCP detention, the transcript makes clear the district attorney's office had nothing to do with it.[3] To say the Commonwealth breached its agreement in the present case under these circumstances would be tantamount to giving Appellant license to violate a prior county probation without jeopardizing his furlough in a state case.

The furlough did not give Appellant immunity to violate a prior probation. In fact, while he was on furlough in this case, Appellant was still subject to the terms and conditions of his supervision in an unrelated case. Appellant's compliance with the terms and conditions of his supervision in an unrelated case was his responsibility; and his detention for failing to comply was also his responsibility. Appellant was responsible for squandering his release by virtue of his own actions, which led to his hospitalization and ensuing detention. The Commonwealth kept its agreement and did nothing initially to interfere with Appellant's furlough. Accordingly, we affirm the court's decision to deny the requested relief.

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[3] Appellant's position at the hearing was that he was not on heroin or any other illegal drugs in July 2008, but that he was on prescription medication which led to an unfortunate reaction and the hospitalization. (***See*** N.T. PCRA Hearing, 8/12/09, at 13). Nevertheless, Appellant offered no medical documentation or proof to rebut the contention that he had been hospitalized in July 2008, due to a heroin overdose. (***Id.*** at 12).

Order affirmed.

Judgment Entered:

Eleanor R. Valecko
Deputy Prothonotary

DATE: SEPTEMBER 7, 2011

Shawn Martz #HR-8462
SCI Coal Township
1 Kelley Drive
Coal Township, PA 17866

NO FEE
Enclosed

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